UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURE DECISIONS

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PREFATORY NOTE

Agriculture Decisions is an official publication designed to facilitate access to decisions and orders issued by the Secretary of Agriculture, or officers authorized to act in his stead, in matters arising under laws administered by the Department of Agriculture.

The published decisions principally consist of those issued in formal adjudicatory administrative proceedings conducted for the Department under various statutes and regulations pursuant to the Administrative Procedure Act. Selected court decisions concerning the Department's regulatory programs are also included. The Department is required to publish its rules and regulations in the Federal Register and, therefore, they are not included in Agriculture Decisions.

Consent Decisions entered subsequent to December 31, 1986 are no longer published. However, a list of these decisions is included. (53 F.R. 6999, March 4, 1988.) The decisions are on file and may be inspected upon request made to the Hearing Clerk, Office of Administrative Law Judges.

Decisions are published in order of their issuance or finality under the principal statutes administered by the Department, which are the Agricultural Marketing Act of 1946 (7 U.S.C. § 1621 *et seq.)*, the Agricultural Marketing Agreement Act of 1937 (U.S.C. § 601 *et seq.)*, Animal Quarantine and Related Laws (21 U.S.C. § 111 *et seq.)*, the Animal Welfare Act (7 U.S.C. § 2131 *et seq.)*, the Federal Meat Inspection Act (21 U.S.C. § 601 *et seq.)*, the Grain Standards Act (7 U.S.C. § 1821 *et seq.)*, the Horse Protection Act (15 U.S.C. § 1821 *et seq.)*, the Packers and Stockyards Act, 1921 (7 U.S.C. § 181 *et seq.)*, the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. § 499a *et seq.)*, the Plant Quarantine Act (7 U.S.C. § 151 *et seq.)*, the Poultry Products Inspection Act (21 U.S.C. § 451 *et seq.)*, and the Virus-Serum-Toxin Act of 1913 (21 U.S.C. §151 *et seq.)*.

The published decisions may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket or decision number. Prior to 1942 decisions were identified by docket and decision numbers, e.g., D-578; S. 1150 and the use of such references generally indicates that the decision has not been published in Agriculture Decisions.

LIST OF DECISIONS REPORTED

NOVEMBER 1988

PERISHABLE AGRICULTURAL COMMODITIES ACT(Cont.)

Court Decisions(Cont.)

Disciplinary Decisions

Reparation Decisions

PERISHABLE AGRICULTURAL COMMODITIES ACT(Cont.)

Reparation Decisions(Cont.)

PERISHABLE AGRICULTURAL COMMODITIES ACT(Cont.)

Reparation Decisions(Cont.)

PERISHABLE AGRICULTURAL COMMODITIES ACT(Cont.)

Reparation Decisions(Cont.)

PERISHABLE AGRICULTURAL COMMODITIES ACT(Cont.)

Reparation Decisions(Cont.)

PERISHABLE AGRICULTURAL COMMODITIES ACT(Cont.)

Reparation Decisions(Cont.)

Reparation Default Orders

PERISHABLE AGRICULTURAL COMMODITIES ACT(Cont.)

Reparation Default Orders(Cont.)

PERISHABLE AGRICULTURAL COMMODITIES ACT(Cont.)

Reparation Default Orders(Cont.)

In re: JOHN R. BOWMAN.
A.Q. Docket No. 88-13.
Default Decision and Order filed October 12, 1988.

Interstate movement of cattle without certificate - Failure to file answer.

Christine O'Leary, for Complainant.
Respondent, pro se.
Decision and Order issued by Administrative Law Judge Dorothea A Baker.

DEFAULT DECISION AND ORDER

This is an administrative proceeding for the assessment of a civil penalty under the Act of February 2, 1903, as amended (Act) for a violation of the regulations issued under the Act that govern the interstate movement of cattle because of brucellosis (9 C.F.R § 78.11 *et seq.*), hereinafter referred to as the regulations.

The proceeding was instituted by a complaint filed on July 17, 1988, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that on or about September 19, 1985, respondent moved six (6) cattle, over twenty-four months of age, interstate from Owego, New York, to Danville, Pennsylvania, in violation of section 78.9(a) of the regulations (9 C.F.R. § 78.9(a)), because the cattle were not accompanied interstate by a certificate, as required.

Respondent failed to file a response to the complaint within the time provided by section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)). In accordance with section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)), such failure to deny or otherwise respond to an allegation in the complaint is deemed, for purposes of this proceeding, an admission of said allegation.

In view of the aforementioned facts, respondent is deemed to have admitted the material allegations in the complaint, and, therefore, respondent has waived his right to a hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). This Default Decision and Order, therefore, is issued pursuant to sections 1.136 and 1.139 of the Rules of Practice (7 C.F.R. § 1.136 and § 1.139).

Accordingly, the material facts alleged in the complaint, which respondent is deemed to have admitted, are adopted and set forth herein as the findings of fact.

Findings of Fact

1. Respondent, John R. Bowman, is an individual whose mailing address is R.D. 4, Bloomsburg, Pennsylvania 17815.

2. On or about September 19, 1985, respondent moved six (6) cattle, over twenty-four months of age, interstate from Owego, New York, to Danville,

Pennsylvania, in violation of section 78.9(a) of the regulations (9 C.F.R. § 78.9(a)), because the cattle were not accompanied interstate by a certificate, as required.

Conclusions

By reason of facts in the findings of fact set forth above, the respondent has violated the Act and regulations promulgated thereunder. The following order is therefore issued.

Order

Respondent, John R. Bowman, is hereby assessed a civil penalty of five hundred dollars ($500.00) which shall be payable to the "Treasurer of the United States" by a certified check or money order, and which shall be forwarded to "U.S. Department of Agriculture, APHIS Field Servicing Office, Accounting Section, Butler Square West, 5th Floor, 100 North Sixth Street, Minneapolis, Minnesota 55403" within thirty (30) days from the effective date of this order.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.145).

[This default decision and order became final November 22, 1988.-Editor]

In re: AGOSTINHO CAMARA.
A.Q. Docket No. 88-10.
Default Decision and Order filed October 14, 1988.

Swine health - Handling of garbage - Failure to file answer.

Christine M. O'Leary, for Complainant.
Respondent, pro se.
Default Decision and Order issued by Paul Kane, Administrative Law Judge.

DEFAULT DECISION AND ORDER

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations that govern swine health protection (9 C.F.R. § 166.1 *et seq.*), hereinafter referred to as the regulations in accordance with the Rules of Practice in 9 C.F.R. § 167.1 *et seq.* and 7 C.F.R. § 1.130 *et seq.*

This proceeding was instituted by a complaint filed June 7, 1988, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged on or about October 16, 1986, and on or about October 23, 1986, the respondent: (1) fed garbage to swine in violation of 9 C.F.R. § 166.2(a), because the garbage was not treated, as required; (2) failed to prevent swine from access to garbage handling and treatment areas in violation of 9 C.F.R.
§ 166.3(a), because the facility was not constructed to exclude swine from the garbage handling and treatment areas, as required; (3) stored untreated garbage in violation of 9 C.F.R. § 166.4(a), because the untreated garbage was not stored in covered and leakproof containers, as required; (4) maintained his licensed garbage treatment facility in violation of 9 C.F.R. § 166.5(a), because piles of untreated garbage were allowed to accumulate where insects and rodents might breed; (5) maintained his licensed garbage treatment facility in violation of 9 C.F.R. § 166.5(c), because untreated garbage was allowed in an area accessible to swine; and (6) maintained his swine feeding area in violation of 9 C.F.R. § 166.6, because equipment associated with untreated garbage was allowed in the swine feeding area at the treatment premises that was not cleaned and disinfected, as required. More than twenty days have elapsed since respondent was served with the complaint. Respondent has not filed an answer to date. In accordance with section 1.136(c) of the Rules of Practice (7 C.F.R. §1.136(c)), such failure to deny or otherwise respond to an allegation in the complaint, is deemed, for purposes of this proceeding, an admission of said allegation.

This Default Decision and Order, therefore, is issued pursuant to sections 1.136 and 1.139 of the Rules of Practice applicable to this proceeding (7 C.F.R. §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint, which respondent is deemed to have admitted, are adopted and set forth herein as the findings of fact.

Findings of Fact

1. Respondent, Agostinho Camara, is an individual whose mailing address is 105 George Street, Fall River, Massachusetts 02720.

2. On or about October 16, 1986, the respondent fed garbage to swine, in violation of section 166.2(a) of the regulations (9 C.F.R. § 166.2(a)), because garbage was not treated, as required.

3. On or about October 16, 1986, the respondent failed to prevent swine from access to garbage handling and treatment areas, in violation of section 166.3(a) of the regulations (9 C.F.R. § 166.3(a)), because the facility was not constructed to exclude swine from garbage handling and treatment areas, as required.

4. On or about October 16, 1986, the respondent stored untreated

garbage, in violation of section 166.4(a) of the regulations (9 C.F.R. § 166.4(a)), because untreated garbage was not stored in covered and leakproof containers, as required.

5. On or about October 16, 1986, the respondent maintained his licensed garbage treatment facility, in violation of section 166.5(a) of the regulations (9 C.F.R. § 166.5(a)), because piles of untreated garbage were allowed to accumulate where insects and rodents might breed.

6. On or about October 16, 1986, the respondent maintained his licensed garbage treatment facility, in violation of section 166.5(c) of the regulations (9 C.F.R. § 166.5(c)), because untreated garbage was allowed in an area accessible to swine.

7. On or about October 16, 1986, the respondent maintained his swine feeding area, in violation of section 166.6 of the regulations (9 C.F.R. § 166.6), because equipment associated with untreated garbage was allowed in the swine feeding area at the treatment premises that was not cleaned and disinfected, as required.

8. On or about October 23, 1986, the respondent fed garbage to swine, in violation of section 166.2 (a) of the regulations (9 C.F.R. § 166.2(a)), because the garbage was not treated, as required.

9. On or about October 23, 1986, the respondent failed to prevent swine from access to garbage handling and treatment areas, in violation of section 166.3(a) of the regulations (9 C.F.R. § 166 3(a)), because the facility was not constructed to exclude swine from the garbage handling and treatment areas, as required.

10. On or about October 23, 1986, the respondent stored untreated garbage, in violation of section 166.4(a) of the regulations (9 C.F.R. § 166.4(a)), because untreated garbage was not stored in covered and leakproof containers, as required.

11. On or about October 23, 1986, respondent maintained his licensed garbage treatment facility, in violation of section 166.5(a) of the regulations (9 C.F.R. § 166 5(a)), because piles of untreated garbage was allowed to accumulate where insects and rodents might breed.

12. On or about October 23, 1986, the respondent maintained his licensed garbage treatment facility in violation of section 166.5(c) of the regulations (9 C.F.R. § 166.5(c)), because untreated garbage was allowed in an area accessible to swine.

13. On or about October 23, 1986, the respondent maintained his swine feeding areas in violation of section 166.6 of the regulations (9 C.F.R. § 166.6), because equipment associated with untreated garbage was allowed in swine feeding areas at the treatment premises that was not cleaned and disinfected, as required.

Conclusion

By reason of the facts in the findings of fact set forth above, respondent has violated sections 166.2(a), 166.3(a), 166.4(a), 166.5(a), 166.5(c) and 166.6 of the regulations (9 C.F.R.§§ 166.2(a), 166.3(a), 166.4(a), 166.5(a), 166.5(c) and 166.6). Therefore, the following Order is issued.

Order

Respondent, Agostinho Camara, is hereby assessed a civil penalty of twelve thousand dollars ($12,000.00)($1000.00 per violation), which shall be payable to the "Treasurer of the United States" by a certified check or money order, and shall be forwarded to "U.S. Department of Agriculture, Animal and Plant Health Inspection Service, Field Servicing Office, Accounting Section, Butler Square West, 5th Floor, 100 North Sixth Street, Minneapolis, Minnesota 55403," within thirty (30) days from the effective date of this order. In addition, respondent's license to operate a garbage treatment facility under the Swine Health Protection Program is revoked. Finally, respondent, his agents and employees, directly and indirectly, or through any corporate or other device, shall cease and desist from:

1. feeding untreated garbage to swine;

2. maintaining a facility wherein the construction allows the swine access to garbage handling and treatment areas;

3. storing untreated garbage in containers which are not covered and leakproof;

4. allowing piles of garbage to accumulate where insects and rodents might breed;

5. allowing untreated garbage in an area accessible to swine; and

6. allowing equipment associated with untreated garbage in the swine feeding area that have not been cleaned and disinfected.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty-five (35) days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.145).

[This default decision and order became final November 14, 1988.-Editor]

In re: DON SMITH.
A.Q. Docket No. 88-12.
Decision and Order filed October 14, 1988.

Interstate movement without certificate of equine infectious anemia reactor - Admission of material allegations.

Christine O'Leary, for Complainant
Richard Gibbon, for Respondent
Decision and Order issued by Paul Kane, Administrative Law Judge.

DECISION AND ORDER

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the interstate movement of an equine infectious anemia reactor (9 C.F.R. § 75.4(b)), hereinafter referred to as the regulations in accordance with the Rules of Practice in 7 C.F.R. § § 1.130 *et seq.* and 380.1 *et seq.* and 9 C.F.R. § 93.1 *et seq.*

This proceeding was instituted by a complaint filed on June 7, 1988, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that on or about January 4, 1987, the respondent moved one horse, officially identified as an equine infectious anemia reactor, interstate from Oklahoma to Dallas Crown Packing Company, Kaufman, Texas in violation of section 75.4(b) of the regulations (9 C.F.R. § 75.4(b)), because the horse was not accompanied by a certificate, as required.

On July 8, 1988, the respondent filed an Answer responding to and admitting the allegations contained in the complaint. This admission of the allegations contained in the complaint constitutes a waiver of hearing (7 C.F.R. § 1.139).

Accordingly, the material allegations alleged in the complaint are adopted and set forth herein as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.139).

Findings of Fact

1. Don Smith, herein referred to as the respondent, is an individual whose mailing address is Box 745, Henryetta, Oklahoma 74437.

2. On or about January 4, 1987, respondent moved one (1) horse officially identified as an equine infectious anemia reactor, interstate from Oklahoma to Dallas Crown Packing Company, Kaufman, Texas in violation of section 75.4(b) of the regulations (9 C.F.R. § 75.4(b)), because the horse was not accompanied by a certificate, as required.

Conclusions

By reason of the facts contained in the Findings of Fact above, the respondent has violated section 75.4(b) of the regulations (9 C.F.R. § 75.4(b).

Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of five hundred dollars ($500.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to "U.S. Department of Agriculture, APHIS Field Servicing Office, Accounting Section, Butler Square West, 5th Floor, 100 North Sixth Street, Minneapolis, Minnesota, 55403," within thirty (30) days from the effective date of this order. This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty-five (35) days after service of this Decision and Order upon the respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.145).

[This decision and order became final November 30, 1988.-Editor]

In re: PAUL L. MEACHAM and TERRY MEACHAM.
AWA Docket No. 299.
Ruling filed November 23, 1988.

Right to amend complaint.

Robert Ertman, for Complainant.
John J Carter, for Respondent.
Ruling issued by Donald A. Campbell, Judicial Officer.

RULING ON CERTIFIED QUESTION

On November 18, 1988, Administrative Law Judge Paul Kane (ALJ) certified to the Judicial Officer the question as to whether complainant had the absolute right to amend the complaint, notwithstanding respondent's[1] request for an oral hearing in his answer. The ALJ "recommends that the Judicial Officer conclude that the purported amended complaint may be ordered dismissed, as such was filed without the respondents' consent and without a finding of good cause, subsequent to the motion by respondent for a hearing" (Certification at 5).

Respondent's answer states (Answer at 6):

13. Pursuant to 7 C.F.R. 1.136, 1.141, respondent requests an oral hearing.

The rules of practice applicable to this proceeding provide (7 C.F.R. §§ 1.137, .141):

§ 1.137 Amendment of complaint or answer.

At any time prior to the filing of a motion for a hearing, the complaint or answer may be amended. Thereafter, such an amendment may be made with consent of the parties, or as authorized by the Judge upon a showing of good cause.

. . . .

§ 1.141 Procedure for Hearing.

(a) Request for Hearing. Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed. . . .

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[1] Only one respondent was named in the original complaint.

(b) Time and Place. If any material issue of fact is joined by the pleadings, the Judge upon motion of any of the parties, jointly or individually, stating that the matter is at issue and is ready for hearing, shall set a time and place for hearing as soon as feasible thereafter, with due regard for the public interest and the convenience and necessity of the parties.

Respondent's request for a hearing, authorized by § 1.141(a) of the rules of practice, is not the same as a motion for a hearing, referred to in §§ 1.137 and 1.141(b) of the rules of practice. Hence complainant had an absolute right to amend the complaint.

Even if this had been a discretionary matter with the ALJ, it would have been an abuse of discretion to fail to permit the amendment to the complaint in this case. There had been no action in the case from August 9, 1984, when the answer was filed, until over 3 years later (December 24, 1987), when the amended complaint was filed. Certainly the filing of an amended complaint would not have been a factor that unduly delayed the case.

In re: WILLIAM DOBLER.
P&S Docket No. 6709.
Supplemental Order filed November 21, 1988.

Jory Hochberg, for Complainant.
Daniel Diemert, Ellendale, North Dakota, for Respondent.
Supplemental Order issued by Victor W. Palmer, Chief Administrative Law Judge

SUPPLEMENTAL ORDER

On October 6, 1988, an order was issued in the above-captioned matter, which, *inter alia*, suspended respondent as a registrant under the Act until he demonstrates that he is no longer insolvent.

Respondent has now demonstrated that he is no longer insolvent. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued October 6, 1988, is terminated. The order shall remain in full force and effect in all other respects.

In re: PAUL RODMAN and PAUL DAVID RODMAN.
P&S Docket Nn. 6607.
Order filed November 28, 1988.

Eric Paul, for Complainant
Gerard D Eftink, for Respondent
Order issued by Donald A Campbell, Judicial Officer

LIFTING OF STAY ORDER

The stay order previously issued in this proceeding is hereby lifted, since respondents have decided not to appeal the Decision and Order previously filed herein. The suspension provisions of the order previously issued in this case shall become effective on January 2, 1989.

In re: VPI, INC., and LEON VAN TIMMEREN.
P&S Docket No. D-88-64.
Decision and Order filed September 23, 1988.

Failure to pay, when due, the full purchase price of livestock - Insufficient funds checks - Failure to file answer.

John J. Casey, for Complainant
Respondent, pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondents wilfully violated the Act.

Copies of the Complaint and Notice of Hearing and the Rules of Practice (7 C.F.R. § 1.130 *et seq.*) governing proceedings under the Act were served upon respondents by certified mail. Respondents were informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the Complaint and Notice of Hearing.

Respondents have failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the Complaint and Notice of Hearing, which are admitted by respondents' failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. (a) VPI, Inc., hereinafter referred to as the corporate respondent, at all times material herein was a corporation organized and existing under the laws of the State of Michigan, with a principal place of business located at Goshen, Indiana. Its business mailing address is P.O. Box 458, Goshen, Indiana.

(b) The corporate respondent among other things at all times material herein was engaged in the business of buying livestock in commerce for slaughter as a packer.

(c) Leon Van Timmeren, hereinafter referred to as the individual respondent, is an individual residing at Allendale, Michigan.

(d) The individual respondent among other things at all times material herein was:

(1) Owner of 85 percent of the stock of the corporate respondent;

(2) Responsible for the direction, management and control of the corporate respondent; and

(3) Engaged in the business of a packer.

2. Respondents, in connection with their business as a packer, on or about the dates and in the transactions set forth in paragraph II of the Complaint and Notice of Hearing, purchased livestock and in purported payment therefor, issued checks which were returned unpaid by the bank on which they were drawn because respondents did not have sufficient funds on deposit and available in the account on which such checks were drawn to pay such checks when presented.

3. On or about the dates and in the transactions set forth in paragraph II of the Complaint and Notice of Hearing, and on or about the dates and in the transactions set forth in paragraph III of the Complaint and Notice of Hearing, respondents purchased livestock and failed to pay, when due, the full purchase price of such livestock.

Conclusions

By reason of the facts found in Finding of Fact 1 herein, the individual respondent is the *alter ego* of the corporate respondent.

By reason of the facts found in Findings of Fact 2 and 3 herein, the respondents have wilfully violated sections 202(a) and 409 of the Act (7 U.S.C. §§ 192(a), 228b).

Order

Respondents VPI, Inc., its directors, agents, employees, successors and assigns, and Leon Van Timmeren, directly or through any corporate or other device, in connection with operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Purchasing livestock and, in purported payment therefor, issuing a check without having sufficient funds on deposit and available in the account on which such check is drawn to pay such check when presented; and

2. Purchasing livestock and failing to pay when due the full purchase price of such livestock.

Respondents jointly and severally are hereby assessed a civil penalty in the amount of Six Thousand Dollars ($6,000.00), to be paid by check delivered to the attorney for the complainant, payable to the United States Department of Agriculture.

The provisions of this order shall become effective on the first day after service of this order on the respondents. Copies of this decision shall be served upon the parties.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in section 1.142 and 1.145 of the Rules of Practice (7 C.F.R. § 1.130 *et seq.*).

[This decision and order as to respondent VPI, Inc., became final November 3, 1988.-Editor]

In re: VPI, INC., and LEON VAN TIMMEREN.
P&S Docket No. D-88-64.
Decision and Order filed September 23, 1988.

Failure to pay, when due, the full purchase price of livestock - Insufficient funds checks - Failure to file answer.

John J Casey, for Complainant.
Respondent, pro se.
Decision and Order issued by Dorothea A Baker, Administrative Law Judge

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondents wilfully violated the Act.

Copies of the Complaint and Notice of Hearing and the Rules of Practice (7 C.F.R. § 1.130 *et seq.*) governing proceedings under the Act were served upon respondents by certified mail. Respondents were informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the Complaint and Notice of Hearing.

Respondents have failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the Complaint and Notice of Hearing, which are admitted by respondents' failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. (a) VPI, Inc., hereinafter referred to as the corporate respondent, at all times material herein was a corporation organized and existing under the laws of the State of Michigan, with a principal place of business located at Goshen, Indiana. Its business mailing address is P.O. Box 458, Goshen, Indiana.

(b) The corporate respondent among other things at all times material herein was engaged in the business of buying livestock in commerce for slaughter as a packer.

(c) Leon Van Timmeren, hereinafter referred to as the individual respondent, is an individual residing at Allendale, Michigan.

(d) The individual respondent among other things at all times material herein was:

(1) Owner of 85 percent of the stock of the corporate respondent,

(2) Responsible for the direction, management and control of the corporate respondent; and

(3) Engaged in the business of a packer.

2. Respondents, in connection with their business as a packer, on or about the dates and in the transactions set forth in paragraph II of the Complaint and Notice of Hearing, purchased livestock and in purported payment therefor, issued checks which were returned unpaid by the bank on which they were drawn because respondents did not have sufficient funds on deposit and available in the account on which such checks were drawn to pay such checks when presented.

3. On or about the dates and in the transactions set forth in paragraph II of the Complaint and Notice of Hearing, and on or about the dates and in the transactions set forth in paragraph III of the Complaint and Notice of Hearing, respondents purchased livestock and failed to pay, when due, the full purchase price of such livestock.

Conclusions

By reason of the facts found in Finding of Fact 1 herein, the individual respondent is the *alter ego* of the corporate respondent.

By reason of the facts found in Findings of Fact 2 and 3 herein, the respondents have wilfully violated sections 202(a) and 409 of the Act (7 U.S.C. §§ 192(a), 228b).

Order

Respondents VPI, Inc., its directors, agents, employees, successors and assigns, and Leon Van Timmeren, directly or through any corporate or other device, in connection with operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Purchasing livestock and, in purported payment therefor, issuing a check without having sufficient funds on deposit and available in the account on which such check is drawn to pay such check when presented; and

2. Purchasing livestock and failing to pay when due the full purchase price of such livestock.

Respondents jointly and severally are hereby assessed a civil penalty in the amount of Six Thousand Dollars ($6,000.00), to be paid by check delivered to the attorney for the complainant, payable to the United States Department of Agriculture.

The provisions of this order shall become effective on the first day after service of this order on the respondents. Copies of this decision shall be served upon the parties.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in section 1.142 and 1.145 of the Rules of Practice (7 C.F.R. § 1.130 *et seq.*).

[This decision and order as to respondent Leon Van Timmeren became final on November 4, 1988 -Editor]

CRAWFORD LIVESTOCK MARKET, INC. v. MONTE HOOK and DAVID WARD.
P&S Docket No. R-89-1.
Decision and Order Issued November 30, 1988.

Failure to pay for livestock - Liability of agent for disclosed principal - Claim against agent's surety bond.

Peter Train, Presiding Officer.
Complainant, pro se
Respondent, pro se
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
Preliminary Statement

This is a reparation proceeding under the Packers and Stockyards Act, 1921, as amended, begun by a complaint received on March 28, 1988, alleging in substance that on March 4, 1988, respondent Ward purchased 79 head of cattle from complainant's market as agent for respondent Hook and that the market has not been paid. The amount claimed was $43,768.49.

Copies of the complaint and of an investigation report prepared by the Packers and Stockyards Administration of this Department and filed in this proceeding under the Rules of Practice were served on respondent Ward on July 1, 1988, and on respondent Hook on September 9, 1988. A copy of the investigation report was served on complainant on June 30, 1988.

When served with copies of the complaint and investigation report, respondents were notified that an answer thereto should be filed within 20 days after such service, and that failure to file an answer would be deemed an admission of the allegations contained in the complaint, and that the case file would be forwarded to the Office of the Secretary for the issuance of a default order without oral hearing, as provided in the Rules of Practice at 9 C.F.R. 202.106(d). No answer was received from either respondent.

The failure of respondents to file such an answer within the specified time limit is deemed to be an admission of all the allegations of the complaint and a consent to the issuance of a final order in the proceeding, based on all evidence in the record, including information contained in the investigation report.

Findings of Fact

1. Complainant Crawford Livestock Market, hereinafter referred to as complainant, is a corporation whose business mailing address is Box 525, Crawford, Nebraska 69339.

2. Complainant is, and at all times material herein was:

(a) Engaged in the business of operating the Crawford Livestock Market, Inc., stockyard, a posted stockyard under the Act; hereinafter referred to as the stockyard;

(b) Engaged in the business of selling livestock in commerce on a commission basis at the stockyard; and

(c) Registered with the Secretary of Agriculture as a market agency to sell livestock in commerce on a commission basis, and as a dealer to buy and sell livestock in commerce for its own account.

3. Respondent Monte Hook, hereinafter referred to as respondent Hook, is an individual whose address is 1409 N.W., Carroll, Iowa 51401.

4. Respondent Hook at all times material herein was engaged in the business of a dealer buying and selling livestock in commerce for his own account within the meaning of and subject to the provisions of the Act.

5. Respondent David Ward, hereinafter referred to as respondent Ward, is an individual whose mailing address is HC 15, Box 11, Valentine, Nebraska 69201.

6. Respondent Ward, is and at all times material herein was:

(a) Engaged in the business of a market agency buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary as a market agency to buy livestock in commerce in a commission basis, and as a dealer to buy and sell livestock in commerce for his own account.

7. On March 4, 1988, respondent Ward, acting as the agent for respondent Hook, purchased 79 steers at complainant's stockyard for the respondent Hook's account. The cost of the cattle was $43,768.49.

8. At the time of the transaction, complainant knew that respondent Ward was acting as an agent for respondent Hook.

9. Hook resold the animals to a Joe Daniel on March 6, 1988, who paid Hook on March 10, 1988.

10. Neither Hook nor Ward have paid complainant for the 79 steers. However, complainant has recovered $10,000.00 from a claim filed on Ward's bond.

11. The complaint herein was filed within 90 days of the accrual of the alleged cause of action.

Conclusions

The allegations of the complaint stand admitted because neither respondent has filed an answer. Additionally, the investigation report prepared by Department officials also clearly demonstrates that Ward purchased cattle at complainant's market on behalf of respondent Hook. Notwithstanding the fact that Hook subsequently resold the cattle and received payment, neither Hook nor Ward have paid the market. Complainant has, as noted above, recovered $10,000.00 from a claim filed on Ward's bond.

Failure to pay for livestock purchases is a violation of the Packers and Stockyards Act for which reparation may be awarded. *See e.g., Rice v. Wilcox*, 630 F.2d 586 (8th Cir. 198); *Vance v. Reed*, 495 F. Supp. 852 (M.D. Tenn. 1980). Respondent Hook is clearly liable since he was the principal and the person who received the livestock.

With respect to the claim against respondent Ward, the general law of agency is that an agent for a disclosed principal does not become a party to the contract unless he agrees independently to be bound. This principle has been applied in numerous reparation decisions to hold that where an agent buys livestock for a disclosed principal, there is no liability for the purchase price on the part of the agent absent a specific agreement between the parties to the contrary. *See, e.g., Ward v. Seale, et al.*, 31 Agric. Dec. 105; (1972); *John W. Torpey v. Nebraska Order Buyers*, 30 Agric. Dec. 20 (1971), *Bottorff v. Ault*, 22 Agric. Dec. 20 (1963). The investigation report indicates that the market was well aware that Ward was Hook's agent and that, in fact, Hook was on the telephone at the time of the purchase and approved Ward's bid. (Report of Investigation, Exhibit III D). There is no evidence that there was an agreement between the market and Ward that Ward would pay for the purchase if Hook did not do so. Therefore, there is no basis for awarding reparation to the market against Ward, as agent for a disclosed principal, for his principal's default.

This is not to say that the market cannot claim against Ward's surety bond. The bonds required under the Packers and Stockyards Act are designed to provide coverage for livestock purchased by the person bonded for his own account or for the account of others. *Ward v. Seale, supra* at 107. Agents who buy livestock for the account of another have been held liable to the extent of the amount of the agent's bond in the event that principal defaults. *Arnold Livestock Sales Company, Inc. v. Pearson*. 383 F. Supp. 1319 (D. Neb. 1974); *United States Fidelity and Guaranty Co. v. Clover Creek Cattle Co.*, 92 Idaho 889, 452 P.2d 993 (1969). As noted above, complainant has recovered $10,000.00, the face amount of the bond from Ward's surety.

Based on the foregoing, we find that respondent Ward is not liable for the purchase price of the livestock he purchased as agent for respondent Hook. Hook has failed to pay for his livestock purchases in the amount of $43,768.49, in violation of the Packers and Stockyards Act. Hook is therefore liable to pay the entire amount plus interest as reparation. However, since complainant has already received $10,000.00 from Ward's surety, its recovery

shall be reduced by that amount.

On the jurisdiction to issue a reparation order on the basis of a single transaction, See *Hays Livestock Com'n Co., Inc. v. Maly Livestock Commission Co., Inc.*, 498 F.2d 925, (10 Cir. 1974); *Rice v. Wilcox, supra*; *Rowse v. Platte Valley Livestock, Inc.*, 597 F. Supp. 1055, 604 F.Supp. 1463 (D. Nebr. 1985); *Neugebauer v. Ryken*, Civ. 74-4018, U.S.D.C. D.So.Dak., So. Div., 2975, 34 Ag. Dec. 1712; and *Mid-South Order Buyers, Inc. v. Platte Valley Livestock, Inc.*, 210 Nebr. 382, 315 N.W. 2d 229 (1982).

This decision and order is the same as a decision and order issued by the Secretary of Agriculture, being issued pursuant to delegated authority, 7 C.F.R. § 2.35, as authorized by Act of April 4, 1940, 54 Stat. 81, 7 U.S.C. 450c-450g. See also Reorganization Plan No. 2 of 1953, 5 U.S.C., 1982 Ed., app. pg. 1068. It constitutes "an order for the payment of money" within the meaning of Section 309(f) of the Act, 7 U.S.C. 210(f), which provides for enforcement of such an order by court action begun by a complainant.

It is requested that copies of all pleadings filed by any party to any such action be filed with the Hearing Clerk, U.S. Department of Agriculture, Washington, D.C. 20250, for inclusion in the file on this reparation proceeding. It is further requested that, if the construction of the Act, or the jurisdiction to issue this order, becomes an issue in any such action, prompt notice of such fact be given to the Office of the General Counsel, U.S. Department of Agriculture, Washington, D.C. 20250-1400.

On a petition to reopen a hearing, to rehear or reargue a proceeding, or to reconsider an order, see Rule 17 of the Rules of Practice, 9 C.F.R. § 202.117.

On a respondent's right to judicial review of such an order, See *Maly Livestock Commission v. Hardin et al.*, 446 F.2d 4 (8 Cir. 1971); and *Fort Scott Sale Co., Inc. v. Hardy*, 570 F. Supp. 1144 (D. Kan. 1983).

Order

Within 30 days of the date of this order, respondent Hook shall pay to complainant Crawford Livestock Market, Inc., $33,768.49 together with interest thereon at the rate of 13% per annum from May 1, 1988, until paid.

Copies of this Order shall be served on the parties.

COURT DECISIONS

ASINELLI, INC., d/b/a FAMILY PRODUCE., Debtor. WILLIAM L. YAEGER; Chapter 7 Trustee; WACHOVIA BANK and TRUST COMPANY, N.A., Plaintiffs, v. DOLE FRESH FRUIT COMPANY, Defendant.
No. M-88-73.
Decided November 23, 1988.

Trust arising under PACA not included in bankruptcy estate - Withdrawal from Bankruptcy Court denied.

U.S. DISTRICT COURT, M.D. NORTH CAROLINA

MEMORANDUM ORDER

WARD, Hiram H., Senior District Judge.

This matter comes before the Court on defendant's Motion to Withdraw Reference (Sept. 20, 1988) pursuant to 28 U.S.C. § 157(d) and Bankruptcy Rule 5011, 11 U.S.C.A. Plaintiffs' have filed no response. Having considered defendant's motion and the relevant case law, the Court will deny defendant's motion to withdraw the adversary proceeding from the Bankruptcy Court.

FACTS

Debtor, Asinelli, Inc., filed its voluntary petition for relief under Chapter 7 of the Bankruptcy Code on January 21, 1988. At that time, allegedly, debtor was indebted to defendant Dole Fresh Fruit Company in the principal amount of $7,763.35 for produce sold in September and October, 1987, to debtor. During October and November of 1987, defendant, in accordance with the provisions of the Perishable Agricultural Commodities Act, 7 U.S.C. Sections 499a-499s, notified debtor and the Secretary of Agriculture that it was invoking the trust provisions of that statute.[1] [Memorandum of Law in Support of Defendant's Motion for an Order for Withdrawal Pursuant to 28 U.S.C. Section 157(d) (Aug. 30, 1988)].

The Perishable Agricultural Commodities Act (PACA) provides sellers and suppliers of fresh fruits and vegetables with a method of protection from slow paying or non-paying buyers. The act creates a statutory trust on agricultural commodities received by a buyer and proceeds resulting from a subsequent sale of those commodities. The trust exists for the benefit of the unpaid supplier until full payment of the amount owing has been received. 7 U.S.C. § 499e(c)(2).

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[1] Defendant notified debtor and the Secretary by letters dated October 19, and 22, and November 2, 9, 16, and 19, 1987

An unpaid seller perfects its interest in the trust fund benefits by submitting written notice to the nonpaying buyer of its intention to preserve its interest in the trust under the provisions of PACA. The supplier must also file a notice with the Secretary of the Department of Agriculture within certain time limitations contained in PACA § 499e(c)(3). The statutory trust requires no tracing of assets, but attaches to all of the nonpaying buyers' product related inventory and proceeds thereof. 7 U.S.C. § 499e(c)(1).

By letter to debtor and Wachovia Bank, a plaintiff in the adversary proceeding, the Department of Agriculture acknowledged defendant's intention to preserve trust benefits in the principal amount of $6,268.66. Subsequently, plaintiffs initiated this adversary proceeding seeking a declaration of their rights in certain of the debtor's assets held by Wachovia. Assertedly, Wachovia claims a security interest in funds it received from the debtor which were realized from the sale of produce obtained from suppliers like defendant [Memorandum of Law in Support of Defendant's Motion (Aug. 30, 1988)]. Defendant initiated a counterclaim to obtain payment of its PACA trust fund claim, and filed this motion to withdraw pursuant to 28 U.S.C. § 157(d).

DISCUSSION

28 U.S.C. § 157(d), providing for discretionary and mandatory withdrawal, states:

> The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both Title 11 and other laws of the United States regulating organizations or activities affecting interstate commence.

28 U.S.C.A. § 157(d) (Supp. 1985). It appears to the Court that few opinions have addressed the question of withdrawal under § 157(d) where a PACA claim is involved.[2] Further, no decisions from the Fourth Circuit have considered the issue. However, there is authority regarding the propriety of § 157(d) withdrawal involving other non-Title 11 regulatory statutes, which the Court finds helpful in resolving this matter.

Defendant, in support of its motion for mandatory withdrawal, relies on *Block v. Anthony Tammaro, Inc. (In re Anthony Tammaro)*, 56 B.R. 999 (D. N. J. 1986). *Tammaro* involved a fruit wholesaler who filed a voluntary petition while owing suppliers over $140,000. The Secretary of Agriculture brought an adversary proceeding to prevent dissipation of the funds subject to the PACA trust, and further moved for withdrawal pursuant to § 157(d). The district court, after an involved discussion of the relationship between

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[2] A number of opinions, though dealing with a PACA claim and § 157(d), considered solely the timeliness of the motion to withdraw. Defendant's motion appears timely and thus is not an issue before the Court.

Marathon Oil and § 157(d), held simply that a party making a timely motion for withdrawal "must establish that the proceeding involves a *substantial and material* question of both Title 11 and non-code federal law *and* that the non-code federal law has more than a *de minimus* effect on interstate commerce." *Tammaro,* 56 B.R. at 1007 (emphasis added). Based on that holding, the court ruled that withdrawal was required.

The court saw as crucial the issue of whether a PACA trust was part of or separate from the debtor's estate. Based on the determination that the question was one of first impression for that court, the resolution of which "would entail material and substantial consideration of both PACA and Title 11 law," the New Jersey District Court held withdrawal to be mandatory. *Id.* at 1007.

This Court, applying the test of *Tammaro,* reaches a different conclusion and will deny defendant's motion for withdrawal. It appears clear to this Court that an interest in a PACA trust, properly and timely noticed, is not a part of the debtor's estate. Thus, resolving the issue presented in this adversary proceeding will necessitate a simple determination of whether defendant properly perfected his interest and will not require a material and substantial consideration of both Title 11 and non-code law.

1. *The corpus of a trust is not property of the Estate.*

The Fourth Circuit has affirmed that 11 U.S.C. § 541, which defines property of the estate, does not alter the established rule that property held by the debtor in trust belongs to the trust beneficiary and does not become part of the bankruptcy estate. *Mid-Atlantic Supply v. Three Rivers Aluminum Co.,* 790 F.2d 1121 (4th Cir. 1986); 4 *Collier on Bankruptcy* 541.13 at 541-72 (15th Ed. 1988). Although § 541(a)(1) provides that the Bankruptcy Estate consists of "all legal or equitable interests of the debtor in property as of the commencement of the case, § 541(d) makes it clear that the estate does not include property that the debtor holds in trust, rather than in his own right. *Mid-Atlantic,* 790 F.2d at 1124. Elaborating upon this point, the Court of Appeals quoted from the Senate Report regarding § 541:

> Situations occasionally arise where property ostensibly belonging to the debtor will actually not be property of the debtor, but will be held in trust for another. For example, if the debtor has incurred medical bills that were covered by insurance, and the insurance company had sent the payment of the bills to the debtor before the debtor had paid the bills for which the payment was reimbursement, the payment would actually be held in constructive trust for the person to whom the bill was owed. This section, and proposed 11 U.S.C. § 545 also will not affect various statutory provisions that give a creditor of the debtor a lien that is valid outside as well as inside bankruptcy, or that creates a trust fund for the benefit of a creditor of the debtor. *See Packers and Stockyards Act §* 206, 7 U.S.C. 196.

Id. at 1124-25,[3] quoting S.Rep. No. 989, 95th Cong. 2d Sess. 82, *reprinted in* 1978 U.S. Code. Cong. & Ad.News 5787, 5868, *see also Creasy v. Coleman Furniture Corp.*, 763 F.2d 656 (4th Cir. 1985).

Another opinion, *In re Fresh Approach, Inc.*, 51 B.R. 412 (Bkrtcy. N.D. Tex. 1985), considered a trust arising under PACA and determined that it was not included within the debtor's estate. The bankruptcy court, after quoting the same passage from the Senate Report cited by the Fourth Circuit in *Mid-Atlantic, supra,* recognized that Congress intended the PACA amendments to protect produce suppliers by creating a "priority status for unpaid produce claimants, priming even the administrative claims which normally stand first in line in a bankruptcy distribution." *First Approach* 51 B.R. at 420. Because the PACA trust was not a part of the estate, the bankruptcy court held that a creditor who had perfected his security interest in a timely manner had a right to immediate payment of its interest in the PACA trust benefits. *Id.* at 421. *See also In re Fresh Approach, Inc.*, 48 B.R. 926 (Bktcy. N.D. Tex. 1985).

Consistent with these opinions, the Court holds that a statutory trust created under the provisions of PACA, properly and timely perfected under the explicit requirements of that act, is not part of the debtor's estate. It follows that defendant's right to immediate payment of the unpaid funds turns on whether defendant perfected its interest in the trust benefits according to the requirements of PACA.

2. *A determination of whether perfection was proper will not entail material and substantial consideration of PACA and Title 11 law.*

In *In re Texaco, Inc.*, 84B.R. 911 (S.D. N.Y. 1988), the court discussed the requirements for mandatory withdrawal under § 157(d) and noted that consideration of non-code statutes must be more than *de minimus.* "Incidental consideration of non-bankruptcy Federal statutes is not sufficient" for withdrawal under § 157(d); ..."the movant must demonstrate that a resolution of the proceedings will require substantial and material consideration of the non-code federal laws." *Id.* at 921 (citing cases); *In re White Motor Corp.*, 42 B.R. 693 (N.D. Ohio 1984). Noting that § 157(d) must be "construed narrowly and not become an escape hatch through which bankruptcy matters will be removed to the district court," the court recognized that withdrawal is proper when the court is required to make a "significant interpretation of a federal statute as opposed to making an insignificant interpretation or merely applying the law to the facts." *Texaco,* 84 B.R. at 921, quoting *In re Johns Manville Corp.*, 63 B.R. 600, 602 (S.D. N.Y. 1986).

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[3] The Court notes that the PACA trust provisions were expressly modeled on similar trust provisions amended to the Packers and Stockyards Act, and that decisions interpreting the PSA guide the present interpretation of the PACA *Consolidated Marketing, Inc. v. Marvin Properties, Inc.*, 76 B.R. 150, 152-3 (9th Cir BAP 1987).

The motion for withdrawal in *Texaco* stemmed from Texaco's motion for an order approving its assumption of certain oil and gas leases. The argument for withdrawal was that resolution of the matter would require consideration of the Natural Gas Policy Act of 1978. The district judge refused to allow withdrawal for four reasons, one of which was that application of the NGPA would be only a *pro forma* application of the act to the facts to determine the validity of the questioned leases.[4] *Cf. American Tel. & Tel. Co. v. Chateaugay*, 88 B.R. 581 (S.D. N.Y. 1988) (withdrawal deemed mandatory because adversary proceedings entailed significant interpretation of the CERCLA statute and assessment of the relationship of such CERCLA claims to the Bankruptcy Code); *Price v. Craddock*, 85 B.R. 570 (D. Colo. 1988) (withdrawal of adversary proceeding mandatory when debtor alleged counterclaims including violations of federal securities laws).

The Court discerns no conflict in the case at bar between the Bankruptcy Code and PACA that would require withdrawal of reference of the adversary proceeding from the bankruptcy court. Based upon the previously cited authority demonstrating that a properly perfected interest in a PACA trust is not part of the debtor's estate, the Court determines that a resolution of this matter will entail not an in-depth consideration of PACA and Title 11 law, but a mere *pro forma* application of the facts in this case to the requirements for perfection enunciated in PACA.

IT IS, THEREFORE, ORDERED that defendant's Motion to Withdraw Reference from the Bankruptcy Court pursuant to 28 U.S.C. § 157(d) be, and the same hereby is, DENIED.

DAVIS DISTRIBUTORS, INC.; WILSON MUSHROOM COMPANY, Plaintiff-Appellee, v. DAVIS DISTRIBUTORS, INC.; SOVRAN BANK, N.A., Defendants-Appellants.
No. 88-2076.
No. 88-2077.
Decided November 15, 1988.

PACA Statutory trust - effect of credit agreement providing for payment period greater than 30 days.

Trust protection under PACA is limited to transactions in which the agreed time for payment does not exceed 30 days. A credit agreement which nominally provides for a payment period of 30 days, but which also specifically postpones the event of default, as well as any legal remedy, until 60 days, is in effect an agreement for a payment period of 60 days. Transactions governed by this agreement are not eligible for trust protection.

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[4] The Court is further compelled by the language in a footnote of the opinion, *In re Tammaro, supra*, relied upon by defendant in its motion for withdrawal: "Had the Supreme Court or the Court of Appeals for the Third Circuit determined the status of a PACA trust within a debtor's estate, I would not withdraw the reference as "resolution" of that issue would not require "substantial and material consideration" of non-Code law, but merely the application of that binding law to the facts. In similar circumstances, at minimum the presumption would be against mandatory withdrawal." *Tammaro*, 56 B.R. at 1007.

James Robert Schroll, Bennett A. Brown, for Appellants
Bryan T Veis, Peter L. Wellington, Paul P Andrews, for Appellee

U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

WINTER, Chief Judge, and PHILLIPS and SPROUSE, Circuit Judges.
PHILLIPS, Circuit Judge.

Davis Distributors, Inc. (Davis), a Chapter 11 debtor, appeals an order granting relief from the automatic bankruptcy stay, 11 U.S.C. § 362(a), to Wilson Mushroom Company (Wilson), which had supplied produce to Davis and is one of Davis' largest creditors. The district court found that Wilson was entitled to priority as to some estate assets over Davis' other creditors as the beneficiary of a "statutory trust" arising under the provisions of the Perishable Agricultural Commodities Act (PACA), 7 U.S.C. §§ 499a-499s Concluding that Wilson was disqualified to claim protection of the PACA trust because the credit it extended to Davis was for periods in excess of the limits imposed by the PACA regulations, 7 C.F.R. § 46.46, we reverse.

I

Prior to the filing of its Chapter 11 petition (since converted to Chapter 7), Davis was a licensed dealer of mushrooms and other produce to supermarkets, restaurants and other retail establishments. Wilson is a wholesaler and "jobber" of mushrooms. Over a seven-year period beginning in 1980, Wilson regularly supplied Davis with substantial quantities of mushrooms.

Wilson shipped mushrooms to Davis on credit, invoicing amounts due with each shipment. Davis typically made payment on the invoices between thirty and sixty days after each shipment, but fell progressively further behind in payment of its aggregate account balance with Wilson. After 1983, Davis never owed Wilson less than $300,000 on accumulated unpaid invoices, many of which had "aged" considerably

In the summer of 1986, Wilson's management learned that Davis was experiencing significant financial difficulties Wilson apparently wished to continue its business relationship with Davis, but was concerned that Davis' large account balance was unsecured. In an effort to assure Wilson that Davis would fulfill its obligations with respect to past and future sales, the parties executed a written Security Agreement (the Agreement) on October 23, 1986 The Agreement gave Wilson a security interest in Davis' inventory and accounts receivable, and also governed the parties' continuing credit relationship.

In executing the Agreement, Wilson claims now to have sought not only to obtain tangible collateral for the Davis account, but also to preserve its rights to the benefits of a "statutory trust" under the Perishable Agricultural Commodities Act (PACA), 7 U.S.C. §§ 499a-499s. In a 1984 amendment to PACA,[1] Congress had provided for the imposition of a trust on certain assets of a defaulting buyer of perishable agricultural commodities[2] in favor of sellers supplying the produce on a "cash" or "short-term credit" basis.[3] 7 U.S.C. § 499e(c)(2).[4] There are a number of procedural and substantive prerequisites to securing the protection of a PACA trust, the specifics of which the statute leaves largely to the regulatory discretion of the Department of Agriculture. *Id.*, § 499e(c)(3).[5] For example, potential trust beneficiaries must file timely notices with the Department of their claims to PACA trust benefits. *Id.; see also* 7 C.F.R. § 46.46(g).

Relevant in the present case are the PACA regulations designed to insure that a produce supplier seeking the protection of the statutory trust is indeed a "short-term" creditor. PACA requires that buyers make "full payment promptly" for all merchandise received from produce suppliers, 7 U.S.C. § 499b(4), and imposes civil liability on buyers who default on their payment obligations. *Id.*, § 499e(a). In most cases, buyers must pay for shipped commodities within ten days after receipt of the produce. *See* 7 C.F.R. § 46.2(aa). Buyers and sellers may agree to allow more time, but must reduce any such agreement to writing. *Id.*, § 46.2(aa)(11). None of these provisions, of course, directly implicate a seller's eligibility for the protection of the PACA statutory trust. The regulations further provide, however, that "[t]he maximum time for payment for a shipment to which a seller, supplier, or agent can agree *and still qualify for coverage under the trust* is 30 days after receipt and acceptance of the commodities." 7 C.F.R. § 46.46(f)(2) [emphasis added].

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[1] Pub. L. No. 98-273, § 1, 98 Stat. 165 (1984).

[2] PACA defines "perishable agricultural commodity" as "[f]resh fruits and fresh vegetables of every kind and character," 7 U.S.C. § 499a(4)(A), which of course include mushrooms.

[3] *See* H.R. Rep. No. 53, 98th Cong., 2d Sess. 6-7, 12, *reprinted in* 1984 U.S. Code Cong. & Admin. News 405, 410, 415 (report of House Agriculture Committee on PACA amendments).

[4] Section 499e(c)(2) provides, in relevant part:

> Perishable agricultural commodities received by a commission merchant, dealer, or broker in all transactions, and all inventories of food or other products derived from perishable agricultural commodities, and any receivables or proceeds from the sale of such commodities or products, shall be held by such commission merchant, dealer, or broker in trust for the benefit of all unpaid suppliers or sellers of such commodities or agents involved in the transaction, until full payment of the sums owing in connection with such transactions has been received by such unpaid suppliers, sellers, or agents. . . .

[5] The Department's regulations governing PACA statutory trusts are set out at 7 C.F.R. § 46.46 (1988).

Herein lies the heart of the present dispute. Wilson began filing notices under 7 C.F.R. § 46.46(g) on December 11, 1986, thereby asserting affirmatively its claim to the protection of a PACA trust. Davis argues, however, that Wilson was ineligible for trust benefits *ab initio*, because the parties' Security Agreement unambiguously provided for a "maximum time for payment" of outstanding obligations that *exceeded* thirty days. At issue are paragraphs two and three of the Agreement:

> 2. *Credit Terms.* Seller hereby agrees to extend further credit to Buyer upon Buyer's purchase of mushrooms from Seller, subject to the following limitations: (i) Buyer's account with Seller shall at no time exceed a total of Three Hundred Fifty Thousand ($350,000.00) Dollars; and *(ii) Buyer shall pay all invoices in full within thirty (30) days of the date of the invoice.* In the event that Buyer's account balance exceeds the foregoing limitation *or if Buyer fails to pay any invoice in full within sixty (60) days of the date of such invoice, Buyer shall be in default under this Agreement, and Seller shall be entitled to exercise all of the remedies set forth herein, as well as any remedies which may be available at law or in equity*, and especially any and all remedies available under Article 9 of the Uniform Commercial Code.
>
> 3. *Notice and Demand.* In the event that Buyer is in default under its account with Seller, Seller shall, prior to instituting any formal legal proceedings or collection action against Buyer, notify Buyer, in writing, that Buyer is in default under the terms of this Agreement, specifying the nature of the default and demanding payment of all overdue invoices and any other sums of money necessary to cure Buyer's default. *If Buyer fails to cure its default and pay the entire sum demanded within five (5) business days following its receipt of Seller's notice of default and demand for payment, then Seller shall be entitled to exercise all remedies made available to him under this agreement and under any applicable law.* [Emphasis added.]

Davis argues that the quoted provisions expressly permit payment at any time prior to the passage of sixty days after receipt of a shipment, noting that "default" is postponed for sixty days and that Wilson cannot compel payment under the Agreement, by legal means or otherwise, until sixty days have passed. Wilson responds by emphasizing that the Agreement expressly requires that Davis "shall pay all invoices in full within thirty (30) days of the date of the invoice." Wilson characterizes the sixty-day postponement of default as a "grace period," during which Wilson will defer execution on its security. Wilson argues, however, that this consensual forbearance does not relieve Davis of its responsibility to make payment within thirty days.[6]

This dispute over the "time for payment" embodied in the parties' credit relationship (and, in turn, over Wilson's eligibility for PACA trust benefits) crystallized shortly after Davis filed its Chapter 11 petition. Wilson filed a motion in the bankruptcy court seeking relief from the automatic stay, 11 U.S.C. § 362(a), and an order compelling Davis to pay Wilson $365,550.55 as benefits of a PACA trust. The bankruptcy court denied the motion, holding that the Security Agreement by its terms allowed Davis to satisfy its obligation under invoices at any time prior to the expiration of *sixty* days after receiving a shipment of mushrooms. Thus, Wilson failed to comply with the PACA regulations' "maximum time for payment" provision and disqualified itself from the protection of the PACA trust. On Wilson's appeal, the district court reached precisely the opposite conclusion, holding that the Agreement unambiguously required payment within *thirty* days. The court analogized the Agreement's provision deferring default to a "grace period" under a deed of trust and suggested that, while the contractual language postponed Wilson's right to execute on its collateral, it did not defer Davis' underlying thirty-day payment obligation.[7]

II

We need do no more in this case than interpret the disputed terms of a contract.[8] The question is whether the parties' Security Agreement provides for a "maximum time for payment" exceeding thirty days, thereby disqualifying Wilson from the protection of the PACA statutory trust.

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[6] Davis argues, in the alternative, that the contractual language is at least ambiguous, requiring the consideration of extrinsic evidence of the parties' intent with respect to "time for payment." Davis also suggests that, even if the Agreement unambiguously requires satisfaction of unpaid invoices within thirty days, Wilson waived the protection of the payment provision in the "course of performance." In light of our disposition of the central interpretive question, however, we need not reach these claims.

[7] The bankruptcy and district courts reached their (contrary) conclusions on the basis of the "plain meaning" of the Agreement, and did not consider the extrinsic evidence of the parties' intent proffered by Davis. *See* note 7, *supra*.

[8] It is not disputed that, if Wilson's claim qualifies for PACA trust protection, it thereby has priority over all other claims and is entitled to relief from the automatic stay.

We start with the settled rule that "interpretation of a written contract is a question of law subject to *de novo* appellate review." *Scarborough v. Ridgeway*, 726 F.2d 132, 135 (4th Cir. 1984). Our independent reading of the parties' Agreement leads us to conclude that the district court erred in holding that Davis was contractually required to make payment for each shipment within thirty days.

The language in paragraph two of the Agreement, to the effect that Davis "shall pay" for all shipments within thirty days, cannot be read in isolation. We must look to the contract *as a whole* to determine how it speaks with respect to the time within which Davis functionally is obliged to make payment. Reading the relevant provisions together, one cannot escape the conclusion that there simply is no practical significance whatsoever to any failure by Davis to remit payment within thirty days. The Agreement explicitly postpones, until sixty days have passed, not only Davis' actual "default" but also Wilson's right to exercise *any* of its legal or equitable remedies. As a result, and from either party's perspective, it makes no difference whether Davis chooses to wait fifteen or fifty-nine days after receiving a shipment before remitting payment Reading the Agreement as written, Davis would know that, for up to sixty days, it could delay payment with impunity; likewise, Wilson would know that it could do nothing during this time to recover the debt

A contract simply cannot be read to "require" payment within thirty days if it explicitly postpones default *and* all of the attendant consequences for sixty days. Read as a whole, the parties' Security Agreement gives Davis sixty days to pay for each new shipment of produce.

Wilson invokes the general rule of contract interpretation that "a construction which would render the provision of a contract of doubtful validity is to be avoided, if another reasonable construction can be placed upon it." *Newport News Shipbuilding & Drydock Co. v. United States*, 226 F 2d 137, 142-43 (4th Cir. 1955). While our interpretation of the Agreement indeed casts doubt on the validity of the discrete "shall pay" language on which Wilson relies, Wilson has not offered "another reasonable construction" to trigger the *Newport News* rule. The district court gave effect to the thirty-day payment provision in isolation, and held that the sixty-day deferral of default merely postponed Wilson's right to execute on its security. The court argued that, in this sense, the sixty-day deferral was a "grace period" analogous to the postponement of foreclosure under a deed of trust for some fixed period after payment grows overdue on an underlying promissory note. We decline to accept Wilson's invitation to adopt the district court's position or its characterization of the Agreement's practical effect. The contract in question does far more than provide for a period of forbearance on Wilson's right to realize on its collateral; it forecloses *all* attempts to exercise legal and equitable remedies for sixty days. If the Agreement were truly akin to a deed of trust, Wilson could sue on the asserted contractual obligation immediately after thirty days had passed, notwithstanding its obligation to wait thirty additional days before executing on the security. This contract, however, forces Wilson to watch the mail for sixty days before taking *any* action. Even then, Wilson can only give "notice of default," and must wait an additional five days, while Davis is given an opportunity to cure, before filing suit or

attempting to realize on the collateral.[9]

Rather than simply deferring Wilson's right to execute, this Agreement postpones default itself and Wilson's right to exercise *any* remedy.[10] The Agreement cannot reasonably be interpreted, therefore, to "require" payment within thirty days.[11] To the extent that some language in the Agreement thus appears to be superfluous, the draftsmen may be left to wonder at the difference between what they may have intended and what the contract unambiguously says.

III

For these reasons, we hold that Wilson was not eligible for the protection of the PACA statutory trust. The contrary judgment by the district court is reversed and the case is remanded for entry of an order consistent with this opinion. REVERSED. and REMANDED.

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[9] The "cure" and "notice of default" provisions in paragraph three of the Agreement might easily be characterized as "grace period" terms, suggesting the additional difficulty that, under Wilson's interpretation, the contract inexplicably provides for *two* "grace periods."

[10] In its brief, Wilson suggests that we hold that, after thirty days, "Davis was in default by operation of law." Appellee's Brief at 21 We fail t o see how we can so hold when the Agreement expressly *postpones* default for sixty days.

Even if the Agreement did not expressly defer default, the result would be the same. Definitionally, "default" refers to the time at which an injured party becomes entitled to exercise his remedies

[11] The district court may have misapprehended the nature of the Agreement's default-deferral provision and believed that the Agreement in fact merely postponed Wilson's right to execute on underlying collateral In a colloquy with counsel, the court summarized its understanding of the relevant provisions as follows "[T]he agreement itself says that you are not relegated solely to the remedies provided by this agreement. You could go sue on this indebtedness on the 31st day, and not be in contravention of this agreement " Joint Appendix on Appeal at 61-62 (transcript of district court hearing) Later, explaining Wilson's obligations: "We agree that we will not undertake to realize on our security for 60 days, but that doesn't obviate your obligation to pay it in 30 days." *Id* at 62. Contrary to the district court's apparent understanding, however, the Agreement expressly withdraws Wilson's right to be "standing at the courthouse door," or indeed to do anything, "on the 31st day."

In re: CITRUS WORLD, INC.
PACA Docket No. D-88-534.
Decision and Order issued September 30, 1988.

Failure to make full payment promptly - Failure to file answer.

Sharlene Lassiter, for Complainant
Gary L Compton, Las Vegas, Nevada, for Respondent
Decision and Order issued by Victor W. Palmer, Administrative Law Judge

DECISION AND ORDER

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as PACA, instituted by a complaint filed on June 29, 1988, by the Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. The complaint contains the allegations that during the period July 1985 through August 1986, respondent purchased, received and accepted in interstate and foreign commerce, from 26 sellers, 263 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, or the outstanding balances due, in the amount of $459,078 92

A copy of the complaint was served on respondents. Neither respondent filed an answer to the complaint, which constitutes an admission of the material allegations of fact contained therein, and a waiver of hearing, pursuant to section 1.139 of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary (7 C.F.R. § 1.139). Consequently, complainant filed a motion for the issuance of a decision. Therefore, the following Decision and Order is issued without further investigation or hearing.

Findings of Fact

1. Citrus World, Inc., hereinafter referred to as respondent, is a corporation whose business mailing address was 3480 Spring Mountain Road, Las Vegas, Nevada 89102.

2. Pursuant to the licensing provisions of the PACA, license number 741605 was issued to respondent on April 22, 1974. This license terminated on April 22, 1986, pursuant to Section 4(a) of the PACA (7 U.S C. § 499b(4)), when respondent failed to pay the required annual renewal fee.

3. As more fully set forth in paragraph 5 of the complaint, during the period June 21, 1985 through August 12, 1986, respondent purchased, received and accepted in interstate and foreign commerce, from 26 sellers, 263 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, or the outstanding balances due, in the total amount of $459,078.92.

4. Pursuant to Section 5(c) of the PACA (7 U.S.C. § 499e(c)), a trust was created with respect to the unpaid transactions set forth in paragraph 5 of the complaint. Respondent failed to maintain sufficient assets in trust as required by Section 5(c) of the PACA (7 U.S.C. § 499e(c)).

5. On August 8, 1986, respondent filed a petition pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. § 1101 *et seq.*), with the United States Bankruptcy Court for the District of Nevada, which has been designated as Case No. 86-1775. On July 21, 1987, the court converted the case to a Chapter 7 proceeding.

Conclusions

Respondent's failure to make full payment promptly with respect to the transactions set forth in Finding of Fact No. 3, above, and failure to maintain sufficient assets in trust as required by Section 5(c) of the PACA (7 U.S.C. § 499c(c)), constitutes willful, flagrant and repeated violations of Section 2 of the PACA (7 U.S.C. § 499b), for which the Order below is issued.

Order

A finding is made that respondent Citrus World, Inc. has committed willful, flagrant and repeated violations of Section 2 of the PACA (7 U.S.C. § 499b), and the facts and circumstances set forth above, shall be published.

This Order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the PACA, this Decision will become final without further proceedings thirty-five days after service, unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This decision and order became final November 10, 1988.-Editor.]

ABC TOMATOES, v. MOUNTAIN STATES PRODUCE, CO., a/t/a THOMAS PRODUCE CO.
PACA Docket No. 2-7639.
Order issued November 16, 1988.

Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Respondent was ordered to pay to complainant, as reparation, $1,887.75, plus 13 percent interest per annum thereon from July 1, 1986, until paid.

APPLELAND FRUIT SALES, INC., v. J. M. GARCIA PRODUCE, INC.
PACA Docket No. 2-7468.
Order issued November 22, 1988.

Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Respondent was ordered to pay to complainant as reparation, $7,644.60, plus 13 percent interest per annum thereon from July 1, 1986, until paid.

JACK T. BAILLEE CO. v. PAMCO AIR FRESH, INC., and/or VISTA MCALLEN INC.
PACA Docket No. 2-7277.
Order issued November 8, 1988.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER ON RECONSIDERATION
(Summarized)

Complainant's Motion for Reconsideration was denied.

BUD OF CALIFORNIA v. JONES PRODUCE COMPANY, INC.
PACA Docket No. 2-7544.
Order issued November 15, 1988.

Order issued by Donald A Campbell, Judicial Officer

ORDER OF DISMISSAL
(Summarized)

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*).

By letter dated October 13, 1988, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of October 13, 1988, authorized dismissal of its complaint.

Accordingly, the complaint is hereby dismissed.

CAMERON BROS. CONST., CO., INC., SUN VALLEY RANCH DIVISION v. ANTHONY GAGLIANO & CO., INC.
PACA Docket No. 2-7556.
Order issued November 22, 1988.

Order issued by Donald A Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

The complaint is hereby dismissed.

CHIQUITA BRANDS, INC. v. NEWARK BANANA SUPPLY, INC.
PACA Docket No. 2-7630.
Order issued November 16, 1988.

Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

The complaint is dismissed. The counterclaim is dismissed.

DANNA & DANNA, INC. v. ANTHONY GAGLIANO & CO., INC.
PACA Docket No. R-88-240.
Order issued November 22, 1988.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL
(Summarized)

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*).

By letter dated October 24, 1988, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of October 24, 1988, authorized dismissal of its complaint.

Accordingly, the complaint is hereby dismissed.

EL RANCHO FARMS v. G. R. PRODUCE.
PACA Docket No. 2-7651.
Order issued November 22, 1988.

Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within 30 days from the date of this order respondent shall pay the complainant $1,619.50, with interest thereon at the rate of 13 percent per annum from September 1, 1986, until paid.

FRESH WESTERN MARKETING, INC. v. INTERNATIONAL PRODUCE DISTRIBUTORS, INC.
PACA Docket No. R-89-07.
Order issued November 9, 1988.

Order issued by Donald A Campbell, Judicial Officer.

ORDER REQUIRING PAYMENT OF UNDISPUTED AMOUNT
(Summarized)

Respondent was ordered to pay complainant, as reparation, $4,088.50 plus 13 percent interest per annum thereon from March 1, 1988, until paid

G & S PRODUCE CO., INC. v. MCDONNELL & BLANKFARD, INC.
PACA Docket No. 2-7508.
Order issued November 22, 1988.

Order issued by Donald A. Campbell, Judicial Officer

DECISION AND ORDER
(Summarized)

Within 30 days from the date of this order respondent shall pay complainant $1,423.40, with interest thereon at the rate of 13 percent per annum from March 1, 1986, until paid.

H&H PRODUCE SALES, INC. v. PAMCO AIR FRESH, INC., and/or VISTA MCALLEN INC., and/or VISTA MCALLEN NOGALES, INC.
PACA Docket No. 2-7460.
Order issued November 8, 1988.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER ON RECONSIDERATION
(Summarized)

Complainant's Motion for Reconsideration was denied.

INDEX MUTUAL ASSOCIATION v. GAYLORD W. TOUCHSTONE, JR., d/b/a TOUCHSTONE & ASSOCIATES.
PACA Docket No. R-89-11.
Order Issued November 9, 1988.

Order issued by Donald A. Campbell, Judicial Officer.

REPARATION ORDER
(Summarized)

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $3,544.00, with interest thereon at the rate of 13 percent per annum from January 1, 1988, until paid.

KLEIMAN & HOCHBERG, INC. v. DOBBINS & RAMAGE, INC.
PACA Docket No. 2-7578.
Order issued November 8, 1988.

Stephen P. McCarron, Silver Spring, MD, for Complainant.
Mitchell H. Stabbe, Washington, D.C, for Respondent.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL
(Summarized)

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*).

On October 11, 1988, the parties filed a stipulation which authorized dismissal of the complaint filed herein.

Accordingly, the complaint is hereby dismissed.

J & S PRODUCE CORP. v. N & G PRODUCE, INC.
PACA Docket No. 2-7545.
Order issued November 9, 1988.

LeRoy W. Gudgeon, Northfield, IL, for Complainant.
Randy G. Black, Park Ridge, IL., for Respondent.

Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within 30 days from the date of this order, respondent shall pay complainant, as reparation, $120,883.83 with interest thereon at a rate of 13 percent per annum from January 1, 1986, until paid.

Within 30 days from the date of this order, respondent shall pay complainant, as additional reparation, $1,035.67 with interest thereon at a rate of 13 percent per annum from the date of this order until paid.

LUNA COMPANY, INC., n/t/a BAKERSFIELD PRODUCE & DISTRIBUTING CO. v. STEVCO, INC., and/or HARRY CARIAN SALES.
PACA Docket No. 2-7452.
Order Issued November 16, 1988.

Reparations for contractual breaches, not torts - Jurisdiction.

Where respondent added sulphur dioxide gas to a truck containing its grapes and another seller's nectarines, and the gas ruined the nectarines, damages are not recoverable under the PACA because PACA lacks jurisdiction over torts committed by a third party

Complainant, pro se.
Respondent, pro se.
George D Becker, Presiding Officer

Order issued by Donald A. Campbell, Judicial Officer

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S C. § 499a *et seq.*). A timely informal complaint was filed on January 7, 1986, in which complainant claimed that respondent owed $3,638.00 in connection with the partial truckload of nectarines sold and shipped in interstate commerce. A formal complaint was filed on August 15, 1986. Both respondents filed answers in which they denied liability in connection with the transaction in issue. Because the amount in controversy is less $15,000.00 the shortened method of procedure provided in Section 47.20 (7 C.F.R. § 47.20) of the Rules of Practice issued pursuant to the Act is applicable. Complainant is a corporation located in Bakersfield, California. Respondent, Stevco, Inc., is a corporation located in Beverly Hills, California. At the time of the transaction involved in this proceeding Stevco was licensed under the Act Respondent, Harry Carian is an individual doing business as Harry Carian Sales, and is located in Coachella, California. At the time of the transaction involved in this proceeding Harry Carian Sales was licensed under the Act.

Findings of Fact

1. On June 21, 1986, complainant bought from Harry Carian Sales a partial truckload of grapes. It also bought from Aristocrat Produce Company a partial truckload of grapes. In addition, complainant bought from Growers National Sales, Inc., 360 cartons of nectarines at $5.85 per carton, plus cooling and palletization of $.70 per carton, for a total contract price of $3,638.00.

2. Complainant arranged for a truck to transport the two partial truckloads of grapes and the partial truckload of nectarines to its customer in Salisbury, North Carolina. The trucker first loaded the nectarines on the truck. It then went to respondent Harry Carian Sales' place of business and loaded the grapes which had been purchased from that business on the truck. At that location respondent Harry Carian Sales' employee, Aram Kandarian, introduced sulfur dioxide gassing into the truck. This action was observed by complainant's representative, Ralph Davis. Mr. Davis immediately complained to Mr. Kandarian, and also discussed the matter with Harry Carian. Mr. Davis additionally informed Steve Gilfenhain, the owner of respondent Stevco. Mr. Kandarian asserted that only a little bit of sulfur

dioxide gas had been introduced, and that no harm would ensue. The truck then went from Harry Carian Sales' place of business to Aristocrat, where the other additional partial truckload of grapes was loaded.

3. The truck left California on June 21, 1985, and proceeded to Salisbury, North Carolina. The grapes all made good delivery at Food Lion, Inc., complainant's customer. However, the nectarines, after federal inspection on June 26, 1985, were rejected by Food Lion due to sulfur dioxide injury The nectarines eventually were dumped.

4. Sulfur dioxide is normally used with respect to grapes which are shipped in interstate commerce. However its effect on nectarines is very deleterious. Sulfur dioxide gas can cause nectarines to become unmerchantable. Such was the case with respect to the nectarines involved in this proceeding.

5. Complainant has paid Growers National Sales, Inc., $3,638.00 with respect to the nectarines involved in this proceeding. Neither respondent has paid any money to complainant with respect to the nectarines. Complainant has paid both Aristocrat and Harry Carian Sales for the grapes which it purchased for them.

Discussion

This is a unique case in which the issue which must ultimately be resolved is whether the Department of Agriculture has jurisdiction over either Steveo, Inc., or Harry Carian Sales with respect to the nectarines. There is a no issue as regards the grapes. They made good delivery and were paid for. However, complainant has alleged that as the result of the improper action of Steveo and Harry Carian Sales the nectarines which were loaded with the grapes on the truck were damaged to the point where they were unmerchantable by the introduction of sulfur dioxide gas. Complainant contends that this was done as a result of negligence by both respondents. The respondents contend, in the case of Steveo, that it had nothing to do with the introduction of the gas, and in the case of Harry Carian Sales, both that it had nothing to do with the introduction of the sulfur dioxide gas, and that in any event the Secretary of Agriculture does not have jurisdiction over the subject matter of this proceeding.

With respect to Steveo, there is no evidence that it was involved in any way other than as a broker with respect to the truckload involved in this proceeding. Allegations to the contrary notwithstanding, complainant has failed to sustain its burden of showing that Steveo had any other relationship to the parties. For that reason alone, and because Steveo was not present at the time the sulfur dioxide was introduced into the truck, the complaint against Steveo must be dismissed. Its obligations as a broker were merely to bring the parties together to assure a purchase and sale of produce.

With respect to Harry Carian Sales, although Harry Carian denies strongly that its representative, Aram Kandarian, introduced the sulfur dioxide gas into the truck, we find, based upon our assessment of the credibility of the affidavits provided in this shortened procedure case that Aram Kandarian is responsible for introducing the sulfur dioxide gas into the truck. The representative of complainant, Harry Davis, notified Steve Gilfenbain immediately of the fact that the gas had been introduced. He also stated that

be talked with Aram Kandarian and Harry Carian about the situation when the gas was introduced. All the parties agreed that such gas was introduced. Harry Carian's claim that this was done at Aristocrat is not persuasive. We believe that Harry Carian Sales, in an effort to defend itself against the allegations of the complaint, caused misstatements to be made in the affidavit.

Despite [sic] our findings that the gas was introduced by Aram Kandarian at respoudent's Harry Carian's place of business, we must find for Harry Carian. Harry Carian Sales was not a party to the nectarine contract. Its action, while negligent is not actionable under the PACA. That it caused the destruction of another business' crop when it was not a party to the transaction does not make it liable under the Act. By analogy, if a PACA licensee were driving its automobile and ran into a truck loaded with produce owned by another licensee, destroying the produce, it would not be subject to reparation under the PACA because it was not involved in a contractual relationship with the party whose produce it destroyed. This circumstance is no different. In *Reid and Joyce Packing Company v. G.W. Touchstone*, 15 Agric. Dec. 884 (1956), it was held that a transporter of Perishable Agricultural Commodities could not be held liable because it was negligent in the transportation of the produce. See also *Anonymous Decision*, 4 Agric. Dec. 332 (1945). This situation is no different. It is only by accident that respondent, Harry Carian Sales, had its grapes loaded on a truck which contained nectarines.

We are also constrained to note that complainant, more than respondent, had control of the truck at the time the grapes were loaded at Harry Carian Sales' place of business, and then gassed. Complainant's representative, Harry Davis, was present at the time of the loading, and observed the introduction of the gas into the truck. The truck was under the control of the complainant, not Harry Carian Sales. Mr. Davis had it in his power to insist that the truck be unloaded, that the nectarines be taken off the truck for their protection, and the truck be fumigated before they were reloaded. He obviously knew that the introduction of sulfur dioxide gas into a truck containing nectarines was very dangerous because he immediately complained of the action. His failure to unload the truck was the proximate cause of the damage to the nectarines. It is complainant rather than respondent, Harry Carian Sales, which is responsible for the ultimate damage to the nectarines.

In view of the above the complaint in this proceeding must be dismissed.

Order

The complaint in this proceeding is dismissed.

Copies of this order shall be served upon the parties.

PURE GOLD, INC. v. B. & G. PRODUCE, INC.
PACA Docket No. 2-7650.
Order issued November 16, 1988.

Diversion without authority - Liability of holder of produce to seller - Duty to inquire as to true ownership.

Trucker improperly diverted a truckload of produce from its intended destination to a destination of its choosing It had receiver handle produce for its account. Held: Receiver must pay shipper/owner reasonable value of the produce even though it had paid trucker. Respondent knew or should have known the produce did not belong to the trucker. Therefore, it was not a *bona fide* purchaser for value

Thomas R. Oliveri, Newport Beach, California, for Complainant.
Ted Tsouprake, Coral Gables, Florida, for Respondent.
George D Becker, Presiding Officer.

Order issued by Donald A Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act of 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely informal complaint was filed on August 28, 1986, in which complainant alleged that respondent owed it $11,922.50 in connection with the shipment and sale in interstate commerce of a truckload of lemons and valencia oranges. A formal complaint was filed on February 10, 1987. Respondent filed an answer in which it denied the allegations of the complaint. Because the amount in controversy is less than $15,000 the shortened method of procedure provided in section 47.20 (7 C.F.R. § 47.20) of the Rules of Practice issued pursuant to the Act is applicable. Complainant is a corporation located in Redlands, California. Respondent is a corporation located in North Miami Beach, Florida. At the time of the transaction involved in this proceeding respondent was licensed under the Act.

Findings of Fact

1. On May 1, 1986, complainant consigned to N. P. Deoudes, in Washington, D.C., a truckload of lemons and valencia oranges to be sold for complainant's account. The truck left California on or about May 1, 1986, in a truck operated by George E. Brackett, Sr., of Bostic, North Carolina. The trucking company involved was C.T.B. Trucking, Inc., located in Hickory, North Carolina.

2. While the truck was en route to Washington, D.C., Mack Salicox, of S.T.B. Truck Brokers, Glendale, Arizona, diverted the truck to respondent in North Miami Beach, Florida. Respondent received and accepted the truckload of lemons and valencia oranges, and paid the trucker Mr. Brackett, the freight bill of $2,990.00, less $50.00 for unloading, for a total payment of

3. Respondent sold the lemons and oranges, and remitted to S.T.B. Truck Brokers a total of $6,800.00 with respect to its sales.

4. Respondent did not have a bill of sale from the trucking company reflecting that the trucking company was the owner of the goods when it received and accepted them.

Discussion

This case involves an improper diversion of a truckload of lemons and valencia oranges from their predetermined destination of Washington, D.C. to North Miami Beach, Florida. This was done without the knowledge of the original consignee, N. P. Deoudes, located in Washington, D.C. or complainant while the truck was en route. Rather, it was done by Mack Salicos, the truck broker who arranged the transportation. Complainant, upon being informed of the improper diversion of the goods as to which it was still the owner, invoiced respondent at the prevailing F.O.B. market price. Respondent claims that it never purchased the goods from complainant, but rather handled the goods on consignment for the truck broker, as it had done with respect to other truckloads of goods on prior occasions. However, respondent provided no information as to specific truckloads of goods which it had handled on consignment for the trucker in the past.

Based upon our review of the record available in this case we believe the strong preponderance of the evidence shows that respondent and the trucker entered into an arrangement whereby respondent, either knowingly or recklessly, took dominion over the truckloads of lemons and valencia oranges, and sold them for its benefit and the benefit of the trucker. The evidence would indicate strongly that respondent should at least have known that the trucker was not the true owner of the produce. Certainly, in matters of this nature, a bill of lading is provided to the receiver of the goods showing the point of origin and the shipper of the goods. Respondent does not deny that it received such a bill of lading, nor does it defend against the allegations of complainant that if it had looked at the bill of lading it would have known that the trucker was not the true owner of the produce. Respondent had an obligation to ascertain the true ownership of the goods. Therefore, it was not a *bona fide* purchaser for value. Rather, it was handling what are at best to be described as diverted goods, and probably what are properly describable as stolen produce. Having failed to meet its obligation to ascertain true ownership, which is a simple commercial obligation, respondent is liable for the reasonable market value of the goods. *Cypress Gardens Citrus Products, Inc. v. Joseph Wedner & Son Co.*, 28 Agric. Dec. 218 (1969).

Complainant claimed that the reasonable market value of the goods was $11,922.50. Respondent did not controvert this claim. We find that complainant's claim in this regard is the appropriate amount which it must be paid by respondent for the truckload of lemons and valencia oranges. This amount is in no way diminished by the payments made by respondent to the truck broker since the truck broker was not entitled to any money for the produce.

In view of the above we find that respondent's failure to pay complainant $11,922.50 is a violation of section 2 of the Act for which reparation must be awarded with interest.

Order

With 30 days from the date of this order respondent shall pay to complainant $11,922.50, with interest thereon at the rate of 13% per annum from June 1, 1986, until paid.

Copies of this order shall be served upon the parties.

RAYMON J. LAND v. TOM LANGE COMPANY, INC.
PACA Docket No. 2-7536.
Order issued November 23, 1988.

Order issued by Donald A Campbell, Judicial Officer

DECISION AND ORDER
(Summarized)

Within thirty days from the date of this order, respondent shall pay complainant $2,653.70, as reparation, with interest thereon at a rate of 13 percent per annum from August 1, 1986, until paid.

TOM LANGE CO., INC. v. HI-VALUE PROCESSORS, INC.
PACA Docket No. 2-7667.
Order issued November 16, 1988.

George D. Becker, Presiding Officer.
Complainant, pro se.
Thomas R. Oliveri, Newport Beach, CA, for Respondent.

Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

The complaint in this proceeding is dismissed.

LEFLEUR BROKERAGE, INC. v. FRESHCO, INCORPORATED.
PACA Docket No. 2-7529.
Order issued November 23, 1988.

Edward M. Silverstein, Presiding Officer.
Complainant, pro se.
Thomas R. Oliveri, Newport Beach, CA, for Respondent.

Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within thirty days from the date of this order, respondent shall pay complainant $5,355.00, as reparation, plus interest at a rate of 13 percent per annum from June 1, 1986, until paid.

L. & J. MARKETING CO. v. MANNY LAWRENCE SALES CO., INC.
PACA Docket No. 2-7664.
Order issued November 16, 1988.

George D. Becker, Presiding Officer.
Complainant, pro se.
Respondent, pro se.

Order issued by Donald A Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within thirty days from the date of this order respondent shall pay complainant $5,121.60, with interest thereon at the rate of 13 percent per annum from June 1, 1986, until paid.

MERIT PACKING COMPANY v. PAMCO AIR FRESH, INC.
PACA Docket No. 2-7276.
Order Issued November 8, 1988.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER ON RECONSIDERATION
(Summarized)

Complainant's Motion for Reconsideration is denied.

M & R TOMATO DISTRIBUTOR, INC. v. H. SACKS & SONS PRODUCE CO.
PACA Docket No. R-88-255.
Order issued November 8, 1988.

Order issued by Donald A Campbell, Judicial Officer.

ORDER OF DISMISSAL
(Summarized)

This is a reparation proceeding brought pursuant to the Perishable Agriculture Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*).

The complaint is dismissed without prejudice.

The counterclaim is dismissed.

MURAKAMI FARMS, INC., a/t/a MURAKAMI PRODUCE CO. v. SLIDELL WHOLESALE PRODUCE CO., INC.
PACA Docket No. R-89-05.
Order issued November 9, 1988.

Order issued by Donald A Campbell, Judicial Officer.

ORDER REQUIRING PAYMENT OF UNDISPUTED AMOUNT
(Summarized)

Respondent was ordered to pay complainant, as reparation, $13,209.46, plus 13 percent interest per annum thereon from April 1, 1988, until paid.

THE NUNES COMPANY, INC. v. C.H. ROBINSON COMPANY.
PACA Docket No. R-88-196.
Order issued November 8, 1988.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL
(Summarized)

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*).

By letter dated October 7, 1988, complainant notified the Department that a settlement between the parties had been reached. Complainant, in its letter of October 7, 1988, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is dismissed.

PHELAN & TAYLOR PRODUCE CO. v. PAMCO AIR FRESH, INC., and/or VISTA MCALLEN, INC.
PACA Docket No. 2-7286.
Order issued November 8, 1988.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER ON RECONSIDERATION
(Summarized)

Complainant's Motion for Reconsideration is denied.

OSO TRADING CO., INC., d/b/a TEX-SUN PRODUCE v. D.R. SMITH and JAMES R. SMITH d/b/a MIDWEST MARKETING CO.
PACA Docket No. R-88-138.
Order issued November 8, 1988.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL
(Summarized)

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*).

Complainant, in its letter, authorized dismissal of its complaint filed herein. Accordingly, the complaint was dismissed.

READY PAC PRODUCE, INC. v. SANTA FE PRODUCTS, INC.
PACA Docket No. R-88-269.
Order Issued November 15, 1988.

Peter V. Train, Presiding Officer
Complainant, pro se.
Respondent, pro se.

Order issued by Donald A. Campbell, Judicial Officer.

REPARATION ORDER
(Summarized)

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $20,700.00, with interest thereon at the rate of 13 percent per annum from October 1, 1987, until paid.

SANSU PRODUCE CO., INC. v. ORLANDO WHOLESALE PRODUCE CO., a/t/a MOVSOVITZ OF ORLANDO.
PACA Docket No. 2-7646.
Order issued November 22, 1988.

Jane McCavitt, Presiding Officer.
J. Hardin Marion, Baltimore, MD, for Complainant.
Respondent, pro se

Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within thirty days of this order respondent shall pay complainant as reparation $1,450.00, with interest thereon at the rate of 13 percent per annum from July 1, 1986, until paid.

SOUTH OMAHA FRUIT MARKET, INC. v. HELGET INDUSTRIES.
PACA Docket No. 2-7635.
Order issued November 22, 1988.

George D Becker, Presiding Officer.
Complainant, pro se.
Brian D. Nolan, Omaha, NE, for Respondent.

Order issued by Donald A. Campbell, Judicial Officer

DECISION AND ORDER
(Summarized)

Within thirty days from the date of this order respondent shall pay to complainant $10,761.65, with interest thereon at the rate of 13 percent per annum from April 1, 1987, until paid.

ALLAN C. THOMPSON d/b/a THOMPSON POTATO COMPANY v. MIDWEST PRODUCE BROKERAGE, INC.
PACA Docket No. 2-7378.
Order issued November 9, 1988.

Andrew Y. Stanton, Presiding Officer.
Complainant, pro se.
Respondent, pro se.

Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within thirty days from the date of this order respondent shall pay to complainant $2,501.83, with interest thereon at the rate of 13 percent per annum from October 1, 1983, until paid.

VANGUARD PRODUCE INTERNATIONAL v. KANG'S FARMS, INC.
PACA Docket No. R-89-01.
Order issued November 15, 1988.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL
(Summarized)

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*).

Respondent filed an answer to the complaint in which it claimed that a payment agreement had been entered into by the parties. Complainant, by letter dated October 17, 1988, was given an opportunity to dispute the existence of a payment agreement and was advised that failure to respond would result in the dismissal of the complaint. No response was received by the complainant.

Accordingly, the complaint is hereby dismissed.

WYSOCKI SALES, INC. v. GARY V. DIXON d/b/a BONNIE BLUE PRODUCE CO., and/or CHARLES F. ZAMBITO d/b/a ZAMBITO PRODUCE SALES.
PACA Docket No. R-88-128.
Order issued November 8, 1988.

Order issued by Donald A. Campbell, Judicial Officer

ORDER OF DISMISSAL
(Summarized)

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*).

By letter dated September 26, 1988, complainant requested dismissal of its complaint.

Accordingly, the complaint is dismissed.

REPARATION DEFAULT ORDERS ISSUED BY DONALD A. CAMPBELL, JUDICIAL OFFICER
(SUMMARIZED)

ABATTI PRODUCE INC. v. GREEN BARN RANCHES, INC.
PACA Docket No. RD 89-25.
Default Order issued November 4, 1988.

Respondent was ordered to pay complainant, as reparation, $13,167.00, plus 13 percent interest per annum thereon from June 1, 1987, until paid.

JAMES S. AGAR AND MARK R. SEITZ, d/b/a RANCHO VISTA FARMS v. CALIFORNIA SPROUTS & CELERY CO.
PACA Docket No. RD 88-281.
Order issued November 29, 1988.

ORDER OF DISMISSAL
(Summarized)

This was a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*).

In respondent's proposed answer, it alleges having paid the entire amount claimed in the complaint except for $922.65, which it deducted for brokerage. Respondent also provided copies of its cancelled checks evidencing such payment. On September 27, 1988, complainant was sent a letter and told that, in view of respondent's answer, there did not appear to be any basis for continuing the complaint. Complainant was given 10 days from its receipt of the letter to show cause why the complaint should not be dismissed, but failed to do so. Dismissal of the complaint was thus warranted.

Accordingly, the complaint was dismissed.

CATALINA TRADING CO. v. GERONIMO'S INC.
PACA Docket No. RD 89-10.
Default Order issued November 17, 1988.

Respondent was ordered to pay complainant, as reparation, $11,592.50 plus 13 percent interest per annum thereon from September 1, 1987, until paid.

COMMODITY MARKETING CO., INC. v. ANTHONY J. D'ACQUISTO d/b/a TROPIC BANANA CO.
PACA Docket No. RD 88-457.
Default Order issued November 29, 1988.

Respondent was ordered to pay complainant, as reparation, $2,643.55 plus 13 percent interest per annum thereon from January 1, 1988, until paid.

COMMODITY MARKETING CO., INC. v. ANTHONY J. D'ACQUISTO d/b/a TROPIC BANANA CO.
PACA Docket No. RD 88-457.
Order issued November 29, 1988.

DENIAL OF MOTION TO REOPEN
(Summarized)

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*).

Respondent, was on notice that his March 2, 1988, letter would not be considered an answer to the formal complaint. Respondent has thus failed to provide a good reason for reopening after default, and his motion to reopen is denied.

Copies of this order shall be served upon the parties.

CULIACAN PRODUCE COMPANY INC. v. LESTER SUTER d/b/a SHIPCO a/k/a SHAMROCK INTERNATIONAL PRODUCE.
PACA Docket No. RD 89-7.
Default Order issued November 30, 1988.

Respondent was ordered to pay complainant, as reparation, $7,785.00 plus 13 percent interest per annum thereon from March 1, 1988, until paid.

RICHARD L. DENBO d/b/a RICH DENBO MARKETING v. VANGUARD INTERNATIONAL INC.
PACA Docket No. RD 89-5.
Default Order issued November 30, 1988.

Respondent was ordered to pay complainant, as reparation, $58,626.50 plus 13 percent interest per annum thereon from February 1, 1988, until paid.

FARMERS' MARKETING SERVICE v. OLYMPIC FOOD DISTRIBUTORS, INC.
PACA Docket No. RD 89-4.
Default Order issued November 30, 1988.

Respondent was ordered to pay complainant, as reparation, $22,023.94 plus 13 percent interest per annum thereon from April 1, 1988, until paid.

FRESH WESTERN MARKETING INC. v. INTERNATIONAL PRODUCE (USA) INC.
PACA Docket No. RD 89-9.
Default Order issued November 30, 1988.

Respondent was ordered to pay complainant, as reparation, $4,511.50 plus 13 percent interest per annum thereon from January 1, 1988, until paid.

JAMES P. HAMMOND d/b/a HAZEL DELL MUSHROOMS v. FRENCH EXPRESS CO. INC.
PACA Docket No. RD 89-1.
Default Order Issued November 30, 1988.

Respondent was ordered to pay complainant, as reparation, $708.00 plus 13 percent interest per annum thereon from May 1, 1987, until paid.

HEALD'S VALLEY FARMS, INC. v. CLAYTON J. BRUBAKER d/b/a BRUBAKER STRAWBERRY FARM.
PACA Docket No. RD 88-462.
Order issued November 29, 1988.

ORDER OF DISMISSAL
(Summarized)

This was a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*).

By letter dated September 26, 1988, complainant notified the Department that respondent had paid in full and authorized dismissal of its complaint.

Accordingly, the complaint was dismissed.

CHARLES F. JONES and STEVEN D. JONES d/b/a JONES PRODUCE v. RICHARD SINGLETARY d/b/a CENTRAL FLORIDA MARKETING.
PACA Docket No. RD 88-336.
Order issued November 29, 1988.

ORDER DENYING MOTION TO REOPEN AFTER DEFAULT
(Summarized)

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*).

Respondent's motion to reopen is denied.

The amount awarded in the September 28, 1988, order, including interest, shall be paid within 30 days from the date of this order.

Copies of this order shall be served upon the parties.

LANGDON BARBER GROVES, INC., a/t/a M.W. FRUIT CO. v. MARIA-NINO'S, INC., a/t/a NINO'S FARMERS MARKET.
PACA Docket No. RD 88-383.
Order issued November 29, 1988.

ORDER REOPENING AFTER DEFAULT
(Summarized)

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*).

Respondent's default in the filing of an answer is set aside and the proposed answer submitted by respondent is hereby ordered filed, and a copy thereof shall be served upon complainant, along with this order.

Copies of this order shall be served upon the parties.

ROBERT L. MEYER d/b/a MEYER TOMATOES v. V.F. LANASA, INC.
PACA Docket No. RD 88-417.
Order issued November 29, 1988.

DENIAL OF MOTION TO REOPEN AFTER DEFAULT
(Summarized)

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*).

The reparation awarded in the September 14, 1988, order, including interest, shall be paid within 30 days from the date of this order.

Copies of this order shall be served upon the parties.

REPARATION DEFAULT ORDERS

MOOSE PRODUCE INC. v. WHOLESALE PRODUCE CO. INC.
PACA Docket No. RD 89-8.
Default Order issued November 30, 1988.

Respondent was ordered to pay complainant, as reparation, $2,500 00 plus 13 percent interest per annum thereon from December 1, 1987, until paid.

ROGERS SALES INC. d/b/a DAVE ROGERS INVESTMENT CO. v. JOHN ORTEGA d/b/a EL RANCHO PRODUCE.
PACA Docket No. RD 89-3.
Default Order issued November 30, 1988.

Respondent was ordered to pay complainant, as reparation, $2,874.00 plus 13 percent interest per annum thereon from August 1, 1987, until paid.

STANDARD FRUIT & VEGETABLE CO. INC. v. QUALITY CUTTERS INC.
PACA Docket No. RD 89-2.
Default Order issued November 30, 1988.

Respondent was ordered to pay complainant, as reparation, $3,959.20 plus 13 percent interest per annum thereon from February 1, 1988, until paid.

WHOLESALE PRODUCE SUPPLY INC. v. GREAT LAKES DISTRIBUTORS INC.
PACA Docket No. RD 89-6.
Default Order issued November 30, 1988.

Respondent was ordered to pay complainant, as reparation, $7,863.25 plus 13 percent interest per annum thereon from January 1, 1988, until paid.

CONSENT DECISIONS ISSUED NOVEMBER 1988

(Not published herein.--Editor)

Packers and Stockyards Act

ALL-STATE PACKING CO., INC. P&S Docket No. D 88-102. November 29, 1988.

WILLIAM (BILL) JOHNSON a/k/a WILLIAM Y. JOHNSON. P&S Docket No. D 88-77. November 8, 1988.

DUANE KLOBERDANZ. P&S Docket No. D 88-52. November 2, 1988.

MCANDREWS LIVESTOCK, INC., DAVID MCANDREWS, JOHN MCANDREWS, RAY CHEEVER, GORDON R. YARRINGTON, and ROBERT VAN WEELDEN. P&S Docket No. D 88-24.
Decision with respect to Respondents McAndrews Livestock, Inc., David McAndrews, and John McAndrews. November 21, 1988.

BERT E. SMITH, III. P&S Docket No. D 88-33. November 10, 1988.

FRED WOLFF. P&S Docket No. D 88-13. November 8, 1988.

DEAN WARMINGTON. P&S Docket No. D 88-104. November 21, 1988.

Horse Protection Act

WAYNE BELL, JAN MCRAE, JOANIE MCRAE, and BILL ALLISON. HPA Docket No. 88-7.
Consent Decision as to Wayne Bell. November 10, 1988.
Consent Decision as to Jan McRae and Joanie McRae. November 10, 1988.

ROSE DAY and JACKIE MCCONNELL. HPA Docket No. 88-35.
Consent Decision as to Rose Day. November 29, 1988.
Consent Decision as to Jackie McConnell. November 18, 1988.

JEFF GIVENS and DOUG LUNN. HPA Docket No. 88-4.
Consent Decision as to Jeff Givens. November 10, 1988.
Consent Decision as to Doug Lunn. November 10, 1988.

GERALD K. MURRAY and W.K. STANFIELD. HPA Docket No. 88-31.
Consent Decision as to W.K. Stanfield. November 15, 1988.
DORIS ROBINSON and BOYD HUDGINS. HPA Docket No. 88-33.
Consent Decision as to Boyd Hudgins. November 29, 1988.

JAMES L. STEELESMITH and JOHNNY COOK. HPA Docket No. 88-38.
Consent Decision as to James L. Steelesmith. November 1, 1988.
Consent Decision as to Johnny Cook. November 1, 1988.

RALPH WATKINS, RAY HAUN and MARTY HAUN.
HPA Docket No. 88-12.
Consent Decision as to Ralph Watkins. November 10, 1988.

EDWARD F. WOODS, KATHLEEN WOODS, and BILL YOUNG.
HPA Docket No. 88-53.
Consent Decision as to Edward F. Woods and Kathleen Woods. November 29, 1988.

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